SUPREME COURT, U. S.

FILED

FEB 19 1974

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-885

LEROY LUNA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

LARRY DERRYBERRY
Attorney General of Oklahoma

MARVIN C. EMERSON
First Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Attorneys for Respondent

of Counsel:

KENNETH L. DELASHAW
Assistant Attorney General

February, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Argument and Authorities	3
Conclusion	6

Certificate of Service follows Brief

TABLE OF AUTHORITIES

CASES:

Atkins v. Kansas, 386 F.2d 819 (10th Cir. 1967)	3
Arbuckle v. Turner, 440 F.2d 586 (10th Cir. 1971)	3-4
Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 275 (1969)	3
Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967)	4
Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)	4
Golden v. Henderson, 456 F.2d 376 (5th Cir. 1972), cert. den. 409 U.S. 861, 93 S.Ct. 149, 34 L.Ed.2d 107, reh. den. 409 U.S. 1029, 93 S.Ct. 467, 34 L.Ed.2d 323	4
Halliday v. U. S., 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969)	3
Luna v. State, Okla. Cr., 513 P.2d 1399 (1973)	2
Martinez v. U. S., 344 F.2d 325 (10th Cir. 1965)	3
Miller v. Missouri, 431 F.2d 120 (8th Cir. 1970)	4
Moss v. Cravens, 427 F.2d 139 (9th Cir. 1970)	4

TABLE OF AUTHORITIES CONTINUED

	PAGE
Sanders v. U. S., 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)	3
Stephens v. U. S., 246 F.2d 607 (10th Cir. 1957)	3
U. S., ex rel. Rogers v. Adams, 435 F.2d 1372 (2nd Cir. 1970)	4
United States, ex rel. Sadler v. Pennsylvania, 434 F.2d 997 (3rd Cir. 1970)	4
U. S. v. Johnson, 372 U.S. 106, 66 S.Ct. 464, 90 L.Ed.2d 562, reh. den. 327 U.S. 817, 66 S.Ct. 699, 90 L.Ed. 1040 (1945)	4

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-885

LEROY LUNA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

The petitioner, LeRoy Luna, was charged by Information with the offense of Child Abandonment in the District Court of Hughes County, Oklahoma on August 25, 1954, in that Case No. 2826. On August 27, 1954, the petitioner without benefit of counsel, appeared before the Honorable Bob Howell, District Judge, and entered a plea of guilty to the charge and was sentenced to five (5) years imprisonment with said sentence being suspended "upon good behavior."

On August 27, 1954, a court minute was entered reflecting the following transpiration of events:

> "The defendant appeared in person in open court. Was duly informed of his constitutional rights. Waived time to plead; waived reading of Information and

entered a plea of guilty. Upon the recommendation of assistant county attorney, John R. Turner, Defendant sentenced to serve five years in the State Penitentiary at McAlester, Oklahoma. It is the judgment and sentence of the court that said defendant serve five years in the State Penitentiary at McAlester, Oklahoma, said sentence to be suspended on good behavior."

The sentence was completely executed without a revocation of the suspension and on March 7, 1973, the petitioner filed an application for post conviction relief alleging that the aforementioned plea was defective and an evidentiary hearing was conducted on the matter shortly thereafter. Following the hearing, the Honorable Rudolph Hargrave entered an order denying relief into which were incorporated Findings of Fact and Conclusions of Law, a portion of which reads as follows:

> "It is the conclusion of the Court that the defendant was properly informed of all the necessary constitutional rights at his appearance in District Court; that he effectively waived any and all rights, including any defects in procedure and entered an effective plea of guilty and was properly sentenced thereon. That for the reasons as set out herein the application should be and the same is in all things denied."

Petitioner duly appealed the aforementioned order to the Court of Criminal Appeals of the State of Oklahoma which rendered its opinion affirming the ruling below which is now reported as *Luna* v. *State*, Okla. Cr., 513 P.2d 1399 (1973). The petitioner now seeks a writ of certiorari from this Honorable Court to review that decision.

ARGUMENT AND AUTHORITIES

The petitioner asserts he is entitled to a review of the following issues:

> "(a) Whether petitioner was unconstitutionally deprived of his right to counsel prior to entering a plea of guilty to a felony charge; and
>
> "(b) Whether petitioner involuntarily pleaded guilty to a felony."

As to the issue of voluntariness, petitioner alleges no factual basis other than his general conclusion that the plea was involuntary and apparently asserts that by virtue of the opinion by this Court in *Boykin* v. *Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 275 (1969), a record failing to affirmatively show the plea was intelligently and voluntarily made creates a presumption of involuntariness. It has been repeatedly held that bald legal conclusions unsupported by allegations of fact are insufficient to collaterally attack a judgment in a criminal case. *Sanders* v. *U. S.*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *Martinez* v. *U. S.*, 344 F.2d 325 (10th Cir. 1965); *Atkins* v. *Kansas*, 386 F.2d 819 (10th Cir. 1967); *Stephens* v. *U. S.*, 246 F.2d 607 (10th Cir. 1957). The petitioner merely asserts that the plea was involuntary and rests his conclusion on what he considers to be an insufficient record under *Boykin, supra.* The State, however, would submit that though this Court has not squarely ruled that *Boykin* has prospective application only, the circuits have repeatedly ruled such is the case using reasoning analogous to this Court's opinion in *Halliday* v. *U. S.*, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969), which interpreted F. R. Crim. p. 11. See *Arbuckle*

v. *Turner*, 440 F.2d 586 (10th Cir. 1971); *Moss* v. *Cravens*, 427 F.2d 139 (9th Cir. 1970); *Miller* v. *Missouri*, 431 F.2d 120 (8th Cir. 1970); *Golden* v. *Henderson*, 456 F.2d 376 (5th Cir. 1972), *cert. den.* 409 U.S. 861, 93 S.Ct. 149, 34 L.Ed.2d 107, *reh. den.* 409 U.S. 1029, 93 S.Ct. 467, 34 L.Ed.2d 323; *United States, ex rel. Sadler* v. *Pennsylvania*, 434 F.2d 997 (3rd Cir. 1970); *U. S., ex rel. Rogers* v. *Adams*, 435 F.2d 1372 (2nd Cir. 1970).

The petitioner's allegation that he was unconstitutionally deprived of his right to counsel rests on his contention that the record is silent as to the offer of counsel and valid waiver of counsel. It is the State's position that the record is by no means silent and therefore, obviates the impermissible presumption outlined in *Burgett* v. *Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) and *Carnley* v. *Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). In *Carnley*, at page 515, this Court stated that:

> "[T]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."

Though he had no independent recollection of the defendant's case, the prosecuting attorney testified at the evidentiary hearing that he never proceeded on a plea of guilty during the pertinent period of time without fully interviewing a defendant and discussing the case with him. Further, he could not recall ever advising a defendant as to his proposed recommendation to the court and not making the same recommendation in fact to the bench (Tr. 12). The Judge who accepted the plea also testified that though

he had no independent recollection of the instant case he informed every defendant of his right to counsel and to have one appointed if that defendant had insufficient funds to procure his own attorney and would so appoint counsel unless the defendant waived this right (Tr. 29). The State contends that both the Court of Criminal Appeals and the lower court's determination of voluntariness and adequate waiver though in factual dispute were adequately supported by the court's record herein. In *U. S.* v. *Johnson*, 372 U.S. 106, 66 S.Ct. 464, 90 L.Ed.2d 562, *reh. den.* 327 U.S. 817, 66 S.Ct. 699, 90 L.Ed. 1040 (1945), this Court stated the following:

> "While the appellate court might intervene when the findings of fact are wholly unsupported by evidence . . . [citations omitted] it should never do so where it does not clearly appear that the findings are not supported by any evidence."

It is respectfully submitted, therefore, that the Oklahoma Court of Criminal Appeals was eminently correct in finding petitioner's claims herein were not well-founded and that the lower court's findings of fact were adequately supported by the record. Further, it is the State's position that *Boykin, supra,* the only applicable case cited in support of petitioner's claims herein, does not have retroactive application.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

MARVIN C. EMERSON
First Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Attorneys for Respondent

of Counsel:

KENNETH L. DELASHAW
Assistant Attorney General

February, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record this _____ day of February, 1974:

Mr. Don Hamilton
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102

Marvin C. Emerson